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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1779

ROBERT L. CHAZIN,

Petitioner,

vs.

CARL WITKOVICH, W. F. OSTRANDER, TWIN PINES FEDERAL SAVINGS AND LOAN ASSOCIATION, and T. D. SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondents in Opposition

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OPINIONS BELOW

The opinions of both the District Court (App. "B" of Petition) and the Court of Appeals (App. "A" of Petition) are unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the District Court and the Court of Appeals properly interpreted California's rules of res judicata in holding that petitioner's federal action (the case at bar) was precluded by the judgment in his prior state court proceeding involving the same matter.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional provisions are involved in connection with the one question properly raised by the Petition.

Of the several statutory provisions cited by petitioner, the only pertinent one is California's Declaratory Judgment Act, California Code of Civil Procedure §§ 1060, 1062. The provisions of this statute are set forth in Appendix "D" of the Petition, at 27-28. California's Mortgage Foreclosure Law, Civil Code §§ 2924, 2924b, is relevant only to an understanding of the underlying factual context of this litigation, and has no substantive bearing herein. Its provisions are also set forth in Appendix "D" of the Petition, at 24-27.

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1. The Petition also purports to raise the question of whether petitioner was provided with notice of respondents' intention to foreclose upon real property in accordance with the due process requirements set forth by this Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). *See* Petition, Questions Presented, Nos. 3 and 4, at 2. Inclusion of this issue as a question presented, however, seriously misrepresents the true nature of the Petition, for there are no circumstances under which this question would come before this Court pursuant to this Petition given the present posture of the litigation. See *infra* at 13-14 for a full discussion of this point.

STATEMENT

This litigation concerns the res judicata effect to be accorded a California state court judgment in a subsequent federal court proceeding involving the same matter. The transaction which underlies both the state and federal proceedings is a foreclosure on real property by respondent Twin Pines Federal Savings and Loan Association ("Twin Pines")[2] following repeated, undisputed failures by petitioner to fulfill his monthly payment obligations.

In 1970 petitioner purchased certain real property pursuant to a loan provided by Twin Pines. From almost the inception of this loan petitioner was repeatedly in default on his monthly payment obligations. Finally, in June 1973, after months of continually having to track down petitioner's whereabouts in order to make requests—which went unheeded—for monies long overdue, Twin Pines could no longer avoid formally declaring petitioner's loan to be in default. This action was taken on June 12, 1973, and constituted the second time in less than a year that Twin Pines was forced to take such measures in connection with petitioner's loan.[3]

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2. Twin Pines is related to the Consumers Cooperative of Berkeley, Inc., and is a federally-chartered mutual savings and loan association. Twin Pines is organized and operated according to cooperative principles, and follows a more consumer-oriented approach in its lending transactions than most other lenders.

3. Petitioner's loan was first declared in default by Twin Pines nine months previous to the default which is the basis for the present litigation. This prior default, however, which involved tax and principal arrearages extending over a five-month period, was vacated by Twin Pines as a matter of grace following petitioner's tender, on February 1, 1973, of a portion of the monies due. Petitioner, however, subsequently failed to make further payments toward the remaining arrearages, which involved over $2,000 in delinquent taxes, as had been agreed when the default was vacated. Nor did petitioner make any payments toward interest and principal after March 1973.

The declaration of default was accomplished in accordance with the provisions of Sections 2924 and 2924b of the California Civil Code. Thus, on June 12, 1973, Twin Pines filed a notice of default and intention to foreclose with the county recorder of the county in which the property was located, and within the required ten days thereafter, on June 18, 1973,[4] advised petitioner of this filing by registered mail at the address previously specified by petitioner and filed with the county recorder. This was not the address of the property subject to foreclosure, but the address specified by petitioner as the one at which he wished to receive notice of any default.[5]

Under Section 2924c of the California Civil Code, petitioner had three months from the date when the notice of default was recorded in which to reinstate the loan by making an appropriate tender of all sums due. Although petitioner had at least 60 days' actual notice of the recording of the default, no such tender of all sums due was made before *or at any time after* the expiration of this three-month period.[6]

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4. The Petition erroneously states that this notice was mailed on July 18, 1973. *See* Petition at 3. Petitioner's statement of the facts is riddled with other errors of this type, but this is the only one noted by Twin Pines which seriously distorts the facts.

5. Had petitioner wished to alter the address which he specified for the receipt of notice of default, he could readily have done so pursuant to a simple procedure provided for under California law. Petitioner was well aware of this procedure, and even filed a request for notice of default pursuant thereto. This request was separate and independent from the request contained in the deed of trust involved herein. Both of these requests required that notice be sent to the same address, which, accordingly, was the address relied upon by Twin Pines herein.

6. The suggestion in the Petition that a "full tender" was made by petitioner after the expiration of the three-month period, and that this tender was refused by Twin Pines (see Petition at 4), is a gross and unconscionable distortion of the record. Until the property was finally sold, which because of a preliminary injunction obtained by petitioner, was not until November 8, 1974, Twin Pines at all times stood ready to reinstate petitioner's loan upon payment of all sums legally due. Petitioner failed—and indeed refused—to make such a tender.

On September 12, 1973, at the expiration of the statutory redemption period, petitioner filed suit in the California state courts.[7] Petitioner's suit sought to enjoin sale of the property pending judicial consideration of his request for a declaratory judgment as to whether Twin Pines had provided him with appropriate notice of the pending foreclosure. Petitioner maintained that the notice of intended foreclosure was improper because it should have been mailed to him at the address of the property subject to the foreclosure, and not to the address he had filed with the county recorder.

The preliminary injunction requested by petitioner was granted, and a year later, following a trial on the merits, the Superior Court for Alameda County held against petitioner. After reviewing Twin Pines' several unsuccessful visits to the property in search of petitioner, as well as the return of mail addressed thereto, the state trial judge specifically held that "no [respondent] believed or reasonably should have believed at the time of the mailing of the Notice of Default that [petitioner] resided at or received mail at" the property subject to the foreclosure.

In addition, the state trial court also held that Twin Pines had provided petitioner with notice of the pending foreclosure in full compliance with the provisions of California law, which it was implicitly held established no precise notice period, but merely required that a party in default be given notice sufficient to provide a reasonable op-

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7. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, No. 440595 (Alameda County Superior Ct.).

portunity in which to cure the default. Noting Twin Pines' concerted efforts over a three-month period to locate petitioner, as well as petitioner's "cavalier indifference" to keeping Twin Pines apprised of his whereabouts, the state trial judge readily concluded that under the circumstances, the statutory notice, along with the 60 days' actual notice provided to petitioner, was sufficient and timely notification of the foreclosure proceeding. Consequently, on September 25, 1974, the state trial court vacated its preliminary injunction, and permitted Twin Pines to proceed with the sale of the property.

Petitioner then sought to enjoin the sale by a series of petitions addressed to the California Court of Appeals, the California Supreme Court, and even Mr. Justice Douglas of this Court. Following the denial of each of these petitions, petitioner, on November 7, 1974, instituted a new injunctive proceeding in the United States District Court for the Northern District of California.[8] This is the proceeding which is now before this Court for review.

In this federal proceeding petitioner sought to relitigate the factual findings of the state trial court. Petitioner again claimed that the notice provided to him by Twin Pines was improper because it had not been mailed to the property subject to the foreclosure. This was the only issue raised by petitioner, and was identical to the one presented and decided in the previous Superior Court proceeding. This time, however, petitioner vigorously maintained that the failure to send notice to the property subject to the foreclosure constituted a violation of certain due process rights.

The District Court promptly denied the requested injunctive relief, and soon thereafter, on January 27, 1975, granted Twin Pines' motion for summary judgment on the ground that the federal proceeding was precluded by the

8. Chazin v. Witkovich, No. C74-2374 (N.D. Cal).

prior state court judgment under the rules of res judicata. On December 2, 1976, this determination was unanimously upheld by the Ninth Circuit Court of Appeals. Although it principally relied upon application of the state rules of res judicata, the Court of Appeals also noted an alternative and independent ground for its decision. Specifically, the Court of Appeals held that even if petitioner's constitutional claim were for some reason found to be litigable, it would nonetheless be defeated on the merits because of the collateral estoppel effect of the state trial court's finding that petitioner had actual, timely notice of the default.

Following the dismissal of petitioner's federal action by the District Court, petitioner then proceeded to appeal the Superior Court ruling through the California state court system. The notice issue, including the constitutional due process argument, was presented to the California Court of Appeals, and was rejected on November 17, 1975.[9] This constitutional issue was thereafter presented to the California Supreme Court, which deemed it an insufficient basis for granting a hearing on January 14, 1976.[10] Suprisingly, given petitioner's obvious penchant for the full use of every legal process available to him, certiorari was not sought from this Court with respect to this final state court disposition of his purported constitutional claim.

ARGUMENT

When stripped of its inaccuracies and irrelevancies, this Petition is readily exposed as being a legally misguided attempt by a disgruntled litigant to have this Court review factual and legal conclusions rendered by a state trial court in a separate but related prior proceeding in which cer-

9. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, 1 Civ. 36434 (Ct. App.), Appellant's Opening Brief at 20.

10. Chazin v. Twin Pines Fed. Sav. & Loan Ass'n, *supra*, Petition for Hearing [in the Supreme Court of California] at 9.

tiorari was not sought. A petition of this kind is certainly not one warranting acceptance by this Court.

This Petition emanates from a determination by the Court of Appeals that petitioner's federal action (the case at bar) was precluded by the judgment in his prior state court proceeding involving the same matter. Under the command of the statutory full faith and credit clause,[11] as well as prior decisions of this Court,[12] and at the urging of both petitioner and respondents herein,[13] the Court of Appeals relied upon California's state law of res judicata in order to determine the preclusive effect of the prior state court judgment. The only issue presented by the Petition, therefore, is whether the Court of Appeals properly interpreted California's state law of res judicata as barring petitioner's attempt at relitigating the merits of his claims.

Certiorari is obviously inappropriate in this case. The Court of Appeals decision is supported by the statutory and case law of the State of California, and is clearly correct. Moreover, the decision below, being no more than a determination of state law, necessarily raises no conflict of decision within the federal judicial system, or any pending question of federal law requiring review by this Court. The Petition should therefore unquestionably be denied.

I. The Decision Below Is Clearly Correct.

The correctness of the decision below turns on the proper res judicata effect to be accorded a California state court

11. 28 U.S.C. § 1738 (1970), which provides in pertinent part: [J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

12. *See, e.g.*, American Sur. Co. v. Baldwin, 287 U.S. 156, 165-67 (1932).

13. *See* Petition at 8; Appellee's Opening Brief at 6-8.

judgment rendered in an action for declaratory relief. Contrary to the assertions of petitioner,[14] there is no lack of California authority on this issue. Nor is there any doubt that the Court of Appeals correctly applied this authority to bar petitioner's federal action.[15]

The only distinction between the state and federal actions involved herein is that, in the federal action, petitioner has attempted to pursue a different legal theory than that presented to the state trial court. Petitioner's newly-urged theory is that the notice provided by Twin Pines was in violation of his right to due process. It is undisputed between the parties that ordinarily such a theory would be barred by application of the rules of res judicata. Under California law a party must assert all legal theories in one action, and is not permitted, under application of the rules of res judicata, to attempt to relitigate the same issues in different actions on different legal theories. The statement of California law is set forth in *Lortz v. Connell,* 273 Cal.App.2d 286, 297 (1969):

> As noted in *Sutphin v. Speik, supra* [15 Cal.2d 195, 201-2], ". . . the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, that judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters

14. *See* Petition at 10.

15. Petitioner inexplicably contends that the Court of Appeals failed to apply California state law in order to determine the res judicata effect of the prior state court judgment. *See* Petition at 9. The Court of Appeals decision, however, clearly rests upon and specifically refers to the two California state cases to be discussed herein. *See* Petition, Appendix "A," at 20.

which were raised or could have been raised, on matters litigated or litigable." [emphasis in original]

Petitioner, however, maintains that the usual rules of res judicata do not apply to his peculiar case because the state court action was brought under California Code of Civil Procedure Section 1060, *et seq.* (and, in particular, Section 1062). Specifically, petitioner claims that California Code of Civil Procedure Section 1062 abolishes application of the rules of res judicata to actions brought in the California state courts for declaratory relief. In support of his argument, petitioner cites the case of *Lortz v. Connell, supra.*

Contrary to petitioner's reading, *Lortz* does not stand for the proposition that res judicata has no application to actions tried in declaratory relief. Instead, *Lortz* merely construes Section 1062 to permit a limited exception to res judicata. *Lortz* held that under Section 1062, a party may seek remedies in addition to declaratory relief subsequent to the action for declaratory relief where that party is entitled to *additional relief* based upon the same facts. Specifically, the Court said:

> Consequential or incidental relief may be obtained in an action in which a declaratory judgment is sought, but the failure to seek such relief in such action or suit does not constitute a bar to other proceedings to *enforce the rights determined by the judgment,* whether such other proceeding is by petition filed in the declaratory action or in a separate and independent suit or action subsequently filed, *but predicated, however, upon the declaration of rights contained in the declaratory judgment.* [emphasis supplied]

273 Cal.App.2d at 300. Quoted with approval in *Southern Counties Gas Co. v. Ventura Pipeline Construction Co.,* 19 Cal.App.3d 372, 382 (1971).

The Court continues to state:

> The salutary purpose of the declaratory relief provisions is to permit a prompt adjudication of the respective rights and obligations of the parties in order to relieve them from uncertainty and insecurity with respect to rights, status, and other legal relations [citation]. The general rule referred to above, which does not bar the right to subsequent coercive action, promotes this purpose. It enables a party to get a prompt adjudication without a dispute over the damages suffered. In many cases further proceedings will be unnecessary because the right of the party who might claim damages is not established, or because if his right is established no damages ensue, or, if ensuing, damages may be established without further litigation.

273 Cal.App.2d at 301.

It is apparent from the language of the Court in *Lortz* that Section 1062 allows a party to avoid the bar of res judicata in the event that he obtains a declaration in favor of his rights and wishes to pursue further remedies based upon such declaration. On the other hand, Section 1062 has never been applied to permit parties to litigate issues under a request for declaratory relief, obtain a declaration to the effect that they have no rights, and then relitigate the same issue based on a different legal theory. To the contrary, the specific statement of California law for such a set of facts is in *Dills v. Delira Corp.,* 145 Cal.App.2d 124, 130-31 (1956), where the Court states:

> It is true that Code of Civil Procedure, Section 1062, provides that "no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." However, that language provides merely that when one obtains a declaration, he has not thereby forfeited his right to obtain coercive relief. It certainly was not intended to allow a litigant

who is determined not to have any rights to relitigate his claim in quest of different relief.

The statement in *Dills* is precisely the factual situation presented by the Petition herein. Petitioner litigated his claim in state court, maintaining he had been given improper notice by Twin Pines. Such issue was determined adversely to petitioner, and such determination was upheld on appeal through the Court of Appeals and the Supreme Court of the state. Seeking a redetermination of this very issue, petitioner now appears in federal court seeking declaratory relief and damages claiming the same defect of notice. California Code of Civil Procedure Section 1062 does not change the overwhelming body of law that denies the opportunity to relitigate the same claim in a different forum.

The foregoing statement of the California rules of res judicata, as applied to a declaratory judgment, was presented to the Court of Appeals and specifically adopted in its decision. *See* Petition, Appendix "A," at 20. Adoption of this statement of California law was the considered judgment of three judges who are constantly required to pass upon California law questions, one of whom has long been a resident and lawyer of California. It was also the judgment of the District Court. This is clearly the kind of determination of local law that is ordinarily accepted by this Court, and ought not to be disturbed. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1950); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).[16]

16. *See also* Spiegel's Estate v Commissioner, 335 U.S. 701 (1949), where it was held that even where reasonable arguments could be made on both sides of a question of state law (which of course is not the case here), this Court will follow its general policy and leave undisturbed the Court of Appeals holding on a question of state law.

II. There Is No Pending Question of Federal Law.

The principal question of federal law which the Petition purports to raise is whether petitioner was provided with notice of Twin Pines' intention to foreclose upon real property in accordance with the due process requirements set forth by this Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). *See* Petition, Questions Presented, Nos. 3 and 4, at 2. As has been noted previously, however, assertion of this question at this time seriously misrepresents the true nature of the Petition, for there are no circumstances under which this question would come before this Court pursuant to this Petition given the present posture of the litigation.

The case at bar comes to this Court on the procedural question of whether the Ninth Circuit Court of Appeals properly interpreted California's rules of res judicata. Even were this Court to review, and subsequently overturn, this determination of state law, which is most unlikely, the due process question under *Mullane* would still not be reached. Determination of this question requires two detailed factual inquiries: First, whether the state is sufficiently involved in the foreclosure proceeding to require the application of the due process clause, and if so, whether the notice provided was, under the particular circumstances of this case, reasonably calculated to apprise petitioner of the pendency of the foreclosure proceeding. In light of the summary dispositions below, however, the record is devoid of the facts necessary to determine these questions, especially given the unique factual context of petitioner's case. Thus this Court would be unable to decide these questions pursuant to the Petition filed herein, and would have no recourse other than to remand this case to the lower courts for appropriate findings of fact and resultant

conclusions of law. *See Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52, 63, n.2 (1976); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Calmar Steamship Corp. v. U.S.,* 345 U.S. 446 (1953).

The Petition also contains several misleading suggestions that other federal constitutional questions are involved besides the due process claim under *Mullane.* None of these so-called due process and equal protection claims was ever raised below, and their assertion constitutes a vivid example of petitioner's strained attempts to make his case appear to be something more than an attempt to relitigate issues previously decided in the state courts. Moreover, for the same reasons set forth above in connection with the alleged claim under *Mullane,* these purported claims are premature. That they are frivolous, not to mention abstract and hypothetical, goes without saying given the factual context of petitioner's case. They certainly provide no basis for granting certiorari.

III. There Is No Conflict of Decision.

In another apparent effort to make this Petition appear to have some merit, petitioner literally tosses out the suggestion that the res judicata effect of a prior state court judgment in a subsequent action under 42 U.S.C. § 1983 is the subject of conflicting decisions of the Courts of Appeals. *See* Petition at 8.

At the risk of giving this off-hand remark more attention than it is due, respondents wish merely to point out that petitioner has throughout this litigation consistently sought to have state rules of res judicata applied in determining the res judicata effect of the prior state court judgment. At no time has petitioner heretofore suggested, as he apparently does by citing *Lombard v. Board of Education*

502 F.2d 631 (2d Cir. 1974), that Section 1983 actions override the command of statutory full faith and credit. Obviously, this argument is belatedly raised now merely to confuse and complicate this matter, and make it appear to be that which it is not.

Moreover, this argument is without merit. *Lombard* is an aberrational decision which stands alone among the circuits.[17] It has either been criticized as wrongly decided[18] or has been rationalized by severely limiting it to its particular facts,[19] which are not duplicated herein. Though apparently sometimes relied upon as a basis for seeking certiorari, such petitions have routinely been denied by this Court.[20] In essence, therefore, *Lombard* has been sufficiently discredited or limited so as not to give rise to any conflict of importance, and constitutes no valid basis for seeking certiorari.

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17. *See* Fortune v. Mulherrin, 533 F.2d 21 (1st Cir. 1976); Roy v. Jones, 484 F.2d 96 (3d Cir. 1973); Davis v. Towe, 526 F.2d 588 (4th Cir. 1975); Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970); Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974); Chasteen v. Trans World Airlines, Inc., 520 F.2d 714 (8th Cir. 1975); Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975); Spence v. Latting, 512 F.2d 93 (10th Cir. 1975). *Cf.* Preiser v. Rodriguez, 411 U.S. 475, 497 (1973).

18. Note, 88 HARV. L. REV. 453 (1974).

19. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 VA.L. REV. 250, 276-277 (1974).

20. *See* Burns v. Decker, *cert. denied,* 423 U.S. 1017 (1975), *pet. reh. denied,* 423 U.S. 1081 (1976); First American Bank & Trust Co. v. Ellwein, *cert. denied,* 423 U.S. 1055 (1976).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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